Iszam Kamal bin Ismail v Prestij Bestari Sdn Bhd (Bar Council Malaysia, intervener)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(A)-1657–09 OF 2016
DAVID WONG, HAMID SULTAN AND UMI KALTHUM JJCA
20 JULY 2017

Legal Profession — Professional discipline — Misconduct — Professional misconduct — Sentencing — Advocate and solicitor struck off the Roll — Whether court could interfere in decision of Disciplinary Board ('DB') — Whether decision of DB ought to be set aside — Whether DB failed to consider constitutional safeguards and principle of proportionality — Whether DB compromised the decision-making process

The appellant, an advocate and solicitor, had acted for the respondent in a sale and purchase agreement. In his capacity as a solicitor the appellant had received the sum of RM303,000, which was to be held by the appellant's firm as stakeholders for the respondent company. It later transpired that the appellant had erroneously released the monies to his clerk, who was primarily responsible for the running of the appellant's firm. As a result, the appellant's firm was unable to repay the RM303,000 to the respondent. Upon discovering the error, the appellant lodged a police report against his clerk, who had resigned from his employment but was unable to repay the RM303,000 released to him. In the meantime, the respondent lodged a disciplinary complaint against the appellant. After hearing the complaint, the disciplinary committee ('the DC') recommended that the appellant be suspended for three years and be fined RM10,000. The disciplinary board ('DB') concurred with the DC's findings but elected to order that the appellant be struck off the roll of advocates and solicitors. The appellant appealed to the High Court, which affirmed the decision of the DB. Hence the present appeal. The appellant's main grounds of appeal were, inter alia, that he honestly believed that he was entitled in law to release the monies to his clerk, that the DB was wrong in deciding that the appellant was a danger to the public as an advocate and solicitor and that the order or sentence was disproportionate.

Held, allowing the appeal:

(1) The powers of sentencing empowered to the DB is set out in s 94 of the Legal Profession Act 1976 ('the Act'), which makes it clear that the DB has various options related to sentencing and that it all depends on the nature and gravity of the misconduct. As such, the option to be 'struck out' from the roll should be based on grave misconduct which necessarily

must relate to dishonesty or conduct for which other form of sentencing may not be appropriate. In consequence, the DB is obliged to consider the constitutional provisions and safeguards before deciding to strike off the advocate and solicitor from the roll. The DB is not empowered to strike off an advocate and solicitor's name from the roll based on the whimsical reasons, and/or surmise or conjecture or taking into consideration material evidence which were not before the DC or brushing aside the sentencing recommended by the DC, without reasoned grounds or strike off based on in-house policy of the DB to strike off the advocate for misconduct (see paras 8–9).

(2) The DB under the LPA 1976 must take cognisance of established principles relating to public decision maker and alike which are well established. One important consideration would be to take cognisance of the *Wednesbury* principle in the widest sense to incorporate the principles relating to proportionality and reasonableness in the light of the Federal Constitution. Taking into consideration the proportionality principle, case laws and the various provisions of the Federal Constitution, any reasonable tribunal appraised of the facts will not disturb the findings and recommendations of the DC. The gross disregard of the DB on issues related to proportionality principle and case laws inclusive of constitutional as well as taking into consideration irrelevant matters compromised the decision-making process. This warrants the decision of the DB to be set aside in limine (see paras 10–12, 15 & 25).

[Bahasa Malaysia summary

Perayu, peguambela dan peguamcara, telah bertindak bagi responden dalam perjanjian jual beli. Dalam kapasitinya sebagai peguamcara, perayu telah menerima sejumlah RM303,000, yang dipegang oleh firma perayu sebagai pihak berkepentingan untuk syarikat responden. Ia kemudiannya berlaku bahawa perayu telah tersilap mengeluarkan wang kepada keraninya, yang bertanggungjawab terutamanya untuk menjalankan firma perayu. Akibatnya, firma perayu tidak dapat membayar balik RM303,000 kepada responden. Setelah menyedari kesilapan itu, perayu membuat laporan polis terhadap keraninya, yang telah meletak jawatan dari pekerjaannya tetapi tidak mampu membayar balik RM303,000 yang dilepaskan kepadanya. Dalam pada itu, responden membuat aduan tatatertib terhadap perayu. Selepas mendengar aduan, jawatankuasa tatatertib ('JT') mencadangkan agar perayu digantung selama tiga tahun dan didenda sebanyak RM10,000. Lembaga tatatertib ('LT') bersetuju dengan penemuan JT tetapi memilih untuk memerintahkan supaya perayu dipecat dari daftarai peguambela dan peguamcara. Perayu merayu kepada Mahkamah Tinggi, yang mengekalkan keputusan LT. Justeru rayuan ini. Alasan utama rayuan perayu adalah, antara lain, yang dia secara jujur percaya bahawa dia berhak dari segi undang-undang untuk melepaskan wang itu kepada keraninya, bahawa LT adalah salah salah dalam memutuskan

bahawa perayu itu berbahaya kepada orang awam sebagai peguambela dan peguamcara dan bahawa perintah atau hukuman itu tidak seimbang.

Diputuskan, membenarkan rayuan:

(1) Kuasa menjatuhkan hukuman yang diberi kuasa kepada LT ditetapkan dalam s 94 Akta Profesion Undang-Undang 1976 ('Akta tersebut'), yang menjelaskan bahawa LT mempunyai pelbagai pilihan yang berkaitan dengan hukuman dan bahawa semua itu bergantung kepada sifat dan keseriusan salah laku. Oleh itu, pilihan untuk 'struck out' dari daftarai hendaklah berdasarkan salah laku serius yang semestinya perlu dikaitkan dengan ketidakjujuran atau kelakuan yang mana hukuman lain mungkin tidak sesuai. Akibatnya, LT bertanggungjawab untuk mempertimbangkan peruntukan perlembagaan dan perlindungan sebelum memutuskan untuk membatalkan peguambela dan peguamcara dari daftarai. LT tidak diberi kuasa untuk mengeluarkan nama peguambela dan peguamcara dari daftarai berdasarkan sebab-sebab aneh, dan/atau dugaan atau sangkaan semata-mata atau mengambil kira keterangan material yang tidak di hadapan JT atau mengetepikan hukuman yang disyorkan oleh JT, tanpa alasan asas atau membatalkan berdasarkan polisi dalaman LT untuk membatalkan peguambela kerana salah laku (lihat perenggan 8–9).

(2) LT di bawah Akta tersebut mesti mengambil kira prinsip-prinsip yang ditetapkan berkaitan pembuat keputusan awam dan yang sama adalah ditetapkan. Salah satu pertimbangan penting ialah mengambil perhatian tentang prinsip *Wednesbury* dalam erti kata yang meluas untuk menggabungkan prinsip-prinsip yang berkaitan dengan perkadaran dan kewajaran dalam Perlembagaan Persekutuan. Mengambil kira prinsip perkadaran, kes undang-undang dan pelbagai peruntukan Perlembagaan Persekutuan, mana-mana tribunal munasabah yang dinilai fakta tidak akan mengganggu dapatan dan syor JT. Pengabaian LT terhadap isu-isu berkaitan prinsip perkadaran dan kes undang-undang termasuk perlembagaan serta mengambil kira perkara-perkara yang tidak relevan mengkrompromi proses membuat keputusan. Ini mewajarkan agar keputusan LT diketepikan in limine (lihat perenggan 10–12, 15 & 25).]

Notes

For cases on misconduct, see 9 *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1919–2002.

Cases referred to

A Solicitor, Re [1936] 1 MLJ 192 (refd)

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] 2 All ER 680, CA (refd)

Au Kong Weng v Bar Committee, Pahang [1980] 2 MLJ 89, FC (refd)

David Marshall; Law Society of Singapore v David Saul Marshall, Re [1972] 2 MLJ 221 (refd)
Dharshan Singh Atma Singh v Majlis Peguam Malaysia [2015] MLJU 2350; [2015] 4 CLJ 1083, HC (refd)
Dinesh Kanavaji a/l Kanawagi & Anor v Ragumaran a/l N Gopal (Bar Council Malaysia, intervener) [2016] 5 MLJ 79; [2016] 7 CLJ 667; [2016] 3 AMR 775, CA (refd)
Francis T Seow The Law Society of Singapore v Francis T Seow, Re [1973] 1 MLJ 199 (refd)
GH Conaghan, In Re [1961] MLJ 81 (refd)
HL Wee v The Law Society of Singapore [1982] 2 MLJ 293, PC (refd)
In the matter of an Advocate & Solicitor [1981] 2 MLJ 215b (refd)
In the matter of an Advocate and Solicitor [1984] 1 MLJ 331 (refd)
JB Jeyaratnam v Law Society of Singapore [1988] 3 MLJ 425, PC (refd)
Majlis Peguam Malaysia v Hari Krishnan a/l Jeyapalan [2017] 1 MLJ 770; [2017] 4 CLJ 225, CA (refd)
Ram Goswami, Re [1988] 3 MLJ 376, HC (refd)
Regina v Secretary of State for the Home Department, ex parte Benwell [1985] QB 554, QBD (refd)
Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor [1990] 3 MLJ 364, SC (refd)
TT Rajah; The Law Society of Singapore v Thampoe T Rajah, Re [1973] 1 MLJ 79 (refd)
WE Balasingam v The Bar Council [1986] 1 MLJ 334 (refd)

Legislation referred to

Federal Constitution art 5(1)
Legal Profession Act (Cap 161) s 80(2)(b), (2)(h)
Legal Profession Act (Cap 217, 1970 Ed) s 84, 84(2)(b)
Legal Profession Act 1976 ss 93(2), 93(2)(a), 94, 94(3)(c), (3)(n), (3)(o), 100, 100(1)
Penal Code ss 109, 409

Appeal from: Originating Motion No 17D-15–04 of 2015 (High Court, Kuala Lumpur)

Kamarul Hisham Kamaruddin (Elina Rashid with him) (The Chambers of Kamarul Hisham & Hasnal Rezua) for the appellant.
Christopher Foo Kah Foon (Farah Johan Ariffin with him) (Raja Darryl & Loh) for the intervener.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant's/solicitor's appeal is against the decision of the High Court which affirmed the decision of the disciplinary board ('DB') which

struck out the appellant from the roll of advocates and solicitors of the High Court.

PRELIMINARIES

[2] In the instant case: (i) it is the finding of the disciplinary committee ('DC') as well as the learned trial judge that there was no element of personal dishonesty by the appellant; (ii) the DC only ordered fine of RM10,000 and suspension for a period of three years; and (iii) the DB did not agree with the sentence recommended by DC and after giving an opportunity to be heard to the appellant, struck him out from the roll.

[3] On the facts of the case, though we find merits in the DC findings, we take the view that the DB has failed to consider the proportionality principle related to sentencing. We invited further submission from the appellant as well as the intervener (Bar Council Malaysia).

[4] In the instant case, the learned judge had written a judgment capturing the facts and law comprehensively, but without consideration on the proportionality principle relating to sentencing. This judgment must be read with the judgment of the High Court for the purpose of comprehensiveness.

BRIEF FACTS

[5] To save judicial time, we set out the facts which has been summarised before us in a rudimentary in nature which read as follows:

1. The Appellant acted on behalf of the Respondent for one Sale and Purchase Agreement (SPA).
2. The Appellant's firm requested a differential sum of RM303,000 to be paid to the Appellant's firm for stakeholding.
3. Rashidee Bin Abu, a Director of the Respondent's Company, issued a cheque for the differential sum to the Appellant's firm from his personal account.
4. The Appellant alleged that in October 2011, the Appellant's employee Shakri Hassan approached the Appellant and produced a letter dated 20.10.2010 signed by Rashidee.
5. The Appellant did not realize the typo error to the date in that letter at that time which in fact ought to have been 20.10.2011.
6. It could not have been 2010 because the Appellant did not hold monies in stakeholding for Rashidee then.
7. In the letter, Rashidee authorised a loan to Shakri of the RM303,000 which was in stakeholding.

8. The Appellant therefore issued the sum of RM318,000 (plus ad valorem stamp duty) belonging to Rashidee in favour of Shakri.

9. On 15.11.2011, the Appellant received a letter of demand from solicitors representing Rashidee seeking repayment of the differential sum of RM303,000.

10. The Appellant was shocked to receive the letter as he was unaware that the SPA had been aborted and he had already paid the monies out to Shakri on Rashidee's written instruction.

11. The Appellant confronted Shakri about the transaction who then resigned from employment almost immediately.

12. After lodging a police report against Shakri on 21.12.2011 and notifying Shakri of the act, Shakri approached the Appellant and agreed to return the monies but all his cheques were dishonoured.

13. In February 2012, the Appellant received a letter from DB notifying the Appellant that the Respondent had lodged a disciplinary complaint against the Appellant.

14. DC recommended that the Appellant be suspended for three years and be fined of RM10,000.

15. The DB concurred with the DC's findings but elected to order that the Appellant be struck off the Roll instead.

16. Dissatisfied with the decision, the Appellant filed this appeal.

[6] Findings of the High Court read as follows:

1. The main issue to be considered is whether the Appellant had misappropriated the RM303.000 paid by the Respondent Company to the Appellant for stake holding purposes and consequently whether the Appellant had committed misconduct under section 94(3)(c), (n) and (o) of the LPA as recommended by the DC and affirmed by the DB.

2. The relevant definition of misconduct for this particular appeal would be being dishonest in the discharge of one's duties, gross disregard of the client's interest and being guilty of any conduct which is unbefitting of an advocate and solicitor.

3. The High Court Judge was of the view that the Appellant, after having received the letter and as the solicitor acting for the Respondent, owed the Respondent an obligation to make a detail investigation on the truth of the letter and whether the act of authorising the loan was agreed not by Rashidee only but also by the Respondent's company.

4. The High Court Judge emphasised on the finding of the DC that it was the negligence of the Appellant's part when he did not verify the contents of the letter with the Respondent and he relied on Shakri's words completely.

5. In this case, the Appellant gave the monies to Shakri, allegedly based on a written consent from Rashidee, but as an advocate and solicitor, the Appellant ought to hold a bigger responsibility and negligence cannot be used to absolve himself from his liability.

6. The High Court Judge found that the Appellant had committed a misconduct in accordance with the definition under section 94(c) of the LPA.

7. The Appellant had also used the monies for purposes other than that for which it was intended and had acted on the instructions of a person other than his client to the detriment of his client.

8. The Appellant's act was unprofessional and did not reflect the proper standard that should be upheld by members of the legal profession.

9. The High Court Judge agreed with the findings of the DC and also the decision of the DB that the Appellant had committed a misconduct under section 94(3)(c), (n) and (o) of the LPA.

10. The fact that there was no element of personal dishonesty, which is consistent with the DC's findings, that does not negate the fact that the Appellant was being dishonest in his professional capacity. His action of releasing the monies without express instruction from the client and without proper inquiry with the client themselves reflected a bad image of the members of the legal profession.

[7] The memorandum of appeal, inter alia, read as follows:

1. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan bahawa Perayu telah berlaku curang ('acted dishonesty') dalam erti kata seksyen 94(3)(c) Akta Profesion Undang-Undang 1976 berdasarkan hakikat bahawa Perayu telah gagal melakukan siasatan terhadap arahan yang kononnya diterima daripada penama Rashidee membenarkan wang pemegang kepentingan ('stakeholder sum') dilepaskan kepada penama Shakri sebagai satu pinjaman;

[Rujuk perenggan 30–37 Alasan Penghakiman]

2. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi fakta dan undang-undang apabila gagal menghargai fakta-fakta berikut:

a. Bahawa penama Rashidee telah membayar wang pemegang kepentingan ('stakeholder sum') bagi pilhak Prestij Bestari Sdn Bhd ('Responden');

b. Bahawa penama Rashidee merupakan Pengarah Prestij Bestari Sdn Bhd dan ini tidak dipertikaikan oleh pihak Responden;

c. Bahawa pihak Responden tidak mempertikaikan keesahan surat daripada penama Rashidee bertarikh 20 Oktober 2010 yang mengarahkan agar wang pemegang kepentingan dilepaskan kepada penama Shakri;

d. Bahawa Mahkamah Tinggi sendiri telah membuat dapatan bahawa surat

bertarikh 20 Oktober 2010 tersebut adalah sah; dan
[Rujuk perenggan 32 Alasan Penghakiman]

e. Bahawa dalam pengetahuan Perayu, penama Rashidee dan penama Shakri adalah kawan dan fakta ini tidak dipertikaikan oleh pihak Responden;

Dan di dalam semua keadaan, Perayu telah melepaskan wang pemegang kepentingan kepada penama Shakri berdasarkan kepercayaan telus (*honest belief*) bahawa Perayu berhak di bawah undang-undang untuk berbuat sedemikian meski pun terkhilaf dalam kepercayaan tersebut. Maka, Yang Arif Mahkamah Tinggi terkhilaf dari segi fakta dan undang-undang apabila gagal memutuskan bahawa Perayu telah bertindak tanpa niat curang dalam maksud seksyen 94(3)(c) Akta Profesion Undang-Undang 1976;

3. Dalam mana Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan bahawa Perayu telah berlaku curang, Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi fakta dan undang-undang apabila gagal membuat dapatan bahawa Lembaga Tatatertib Peguam-Peguam telah gagal mengambil kira prinsip imbangan ('proportionality') apabila memerintahkan agar Perayu dipotong dari daftar Peguambela dan Peguamcara Mahkamah Tinggi Malaya melalui Perintah bertarikh 13 Mac 2015;

4. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi fakta dan undang-undang apabila gagal membuat dapatan bahawa Lembaga Tatatertib Peguam-Peguam telah bertindak di luarkuasa/bidangkuasa dan/atau telah terkhilaf dari segi undang-undang apabila mengambil kira aduan-aduan yang masih belum selesai ('pending') terhadap Perayu sebagai menjustifikasikan hukuman yang dijatuhkan terhadap Perayu sedangkan faktor-faktor tersebut adalah tidak relevan dan/atau tidak berupaya di bawah undang-undang untuk diambil kira dalam menjatuhkan hukuman;

5. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi fakta dan undang-undang apabila gagal membuat dapatan bahawa Lembaga Tatatertib Peguam-Peguam telah bertindak di luarkuasa/bidangkuasa dan/atau telah terkhilaf dari segi undang-undang apabila memutuskan bahawa Perayu merupakan seseorang yang berbahaya terhadap masyarakat ('danger to the public') berasaskan hakikat bahawa Perayu telah meninggalkan pengurusan firma Perayu kepada penama Shakri sedangkan penyelewengan ('misappropriation') wang pemegang kepentingan di dalam kes ini berlaku hanya kerana Perayu mempunyai kepercayaan telus bahawa Perayu mempunyai hak untuk melepaskan wang pemegang kepentingan berdasarkan otoriti surat penama Rashidee bertarikh 20 Oktober 2010, maka penyelewengan tersebut tiada kena-mengena dengan peninggalan pengurusan firma Perayu kepada penama Shakri. Maka dalam semua keadaan, Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan fakta apabila gagal memutuskan bahawa Perayu bukanlah seseorang yang berbahaya kepada masyarakat dalam erti kata yang didapati oleh Lembaga Tatatertib Peguam-Peguam.

6. Justeru, dalam semua keadaan, Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan bahawa hukuman terhadap Perayu adalah bersesuaian, setimpal dan tidak dijejaskan oleh

kekhilafan fakta dan/atau undang-undang.

JURISPRUDENCE RELATING TO SENTENCES, PROPORTIONALITY PRINCIPLE AND THE LEGAL PROFESSION ACT

[8] The powers of sentencing empowered to DB is set out in s 94 of the Legal Profession Act 1976 ('the LPA 1976'). That section itself makes it clear that the DB has various options related to sentencing. It all depends on the nature and gravity of the misconduct. The legislature, in the wisdom, directly or indirectly, incorporated the proportionality principle of sentencing by stating that an advocate and solicitor found guilty of any misconduct can be struck out from the roll or suspended or ordered to pay a fine or be reprimanded or censored as the case may be. To put it crudely, the option to 'struck out' from the roll must be based on grave misconduct which necessarily must relate to dishonesty or conduct for which other form of sentencing may not be appropriate.

[9] It is often said that the courts will not interfere with the decision of DB but that general principle will not apply to issues related to sentencing, as sentencing attracts constitutional provisions and safeguards which stands as a cornerstone to safeguard the interest of the public as well as professionals (see *Dinesh Kanavaji a/l Kanawagi & Anor v Ragumaran a/l N Gopal (Bar Council Malaysia, intervener)* [2016] 5 MLJ 79; [2016] 7 CLJ 667; [2016] 3 AMR 775). Advocates and solicitors are not an excluded species under the Federal Constitution. In consequence, the DB is obliged to consider the constitutional provisions and safeguards before deciding to strike off the advocate and solicitor from the Roll. The DB is not empowered to strike off an advocate and solicitor's name from the roll based on the whimsical reasons, and/or surmise or conjecture or taking into consideration material evidence which were not before the DC or brushing aside the sentencing recommended by the DC, without reasoned grounds or strike off based on in house policy of the DB to strike off the advocate for misconduct.

[10] Misconduct under the LPA 1976, though has been defined, still remains as generic term and to a large extent has nexus to ethics and the gravest form relates to criminal conduct. Common sense will dictate not all forms of misconduct will attract the harshest punishment of being struck out from the Roll. The said s 94 reads as follows:

Section 94 of the Legal Profession Act 1976

(1) All advocates and solicitors shall be subject for the purposes of all disciplinary actions to the control of the Disciplinary Board.

(2) Any advocate and solicitor who has been guilty of any misconduct shall be liable to one or more of the following penalties or punishment:

(a) to be struck off the Roll;

(b) to be suspended from practice for any period not exceeding five years;

(c) to be ordered to pay a fine not exceeding fifty thousand ringgit; or

(d) to be reprimanded or censured.

(3) For the purposes of this Part, 'misconduct' means conduct or omission to act in Malaysia or elsewhere by an advocate and solicitor in a professional capacity or otherwise which amounts to grave impropriety and includes —

(a) conviction of a criminal offence which makes him unfit to be a member of his profession;

(b) breach of duty to a court including any failure by him to comply with an undertaking given to a court;

(c) dishonest or fraudulent conduct in the discharge of his duties;

(d) breach of any rule of practice and etiquette of the profession made by the Bar Council under this Act or otherwise;

(e) being adjudicated a bankrupt and being found guilty of any of the acts or omissions mentioned in paragraph (a), (b), (c), (e), (f), (h), (k) or (l) of section 33(6) of the Bankruptcy Act 1967;

(f) the tendering or giving of any gratification to any person for having procured the employment in any legal business of himself or any other advocate and solicitor;

(g) directly or indirectly procuring or attempting to procure the employment of himself or any other advocate and solicitor through or by the instruction of any person to whom any remuneration for obtaining such employment has been given by him or agreed or promised to be so given;

(h) accepting employment in any legal business through a tout;

(i) allowing any unauthorised person to carry on legal business in his name without his direct and immediate control as principal or without proper supervision;

(j) the carrying on by himself, directly or indirectly, of any profession, trade, business or calling which is incompatible with the legal profession or being employed for reward or otherwise in any such profession, trade, business or calling;

(k) the breach of any provision of this Act or of any rules made thereunder or any direction or ruling of the Bar Council;

(l) the disbarment, striking off, suspension or censure in his capacity as a legal practitioner in any other country or being guilty of conduct which would render him to be punished in any other country;

(m) the charging, in the absence of a written agreement, in respect of

professional services rendered to a client, of fees or costs which are grossly excessive in all the circumstances; A

(n) gross disregard of his client's interests; and

(o) being guilty of any conduct which is unbefitting of an advocate and solicitor or which brings or is calculated to bring the legal profession into disrepute. B

(4) Where an advocate and solicitor —

(a) has been found guilty by a court of law of any offence involving dishonesty, misuse or misappropriation of any money or property of a client or of any other person; C

(b) has been disbarred, struck off, suspended, reprimanded or censured in his capacity as a legal practitioner in any other country;

(c) is the subject of a complaint concerning any dishonest act committed by him in his capacity as an advocate and solicitor; D

(d) has left the country or has not attended at his office in such circumstances that the Bar Council may reasonably presume that he has absconded; or

(e) is otherwise incapable from infirmity of body or mind or any other cause of effectively performing the functions of an advocate and solicitor, E

and the Bar Council considers that it would be in the public interest or in the interest of his clients or of the profession that such advocate and solicitor be suspended from practice, the Bar Council may apply to the Disciplinary Board for an order suspending such advocate and solicitor from practice until further notice. F

(4A) Notwithstanding subsection (2), any registered foreign lawyer who has been guilty of any misconduct shall be liable to be suspended, for any period not exceeding five years, or revocation of his registration or reprimanded or censured or ordered to pay a fine, as the case may be. G

(5) A pupil shall mutatis mutandis be subject to the same control by the Disciplinary Board as is by virtue of this section exercised over an advocate and solicitor and any reference to advocate and solicitor in this Part shall mutatis mutandis include a pupil but in lieu of an order striking him off the Roll or suspending him, an order may be made prohibiting the pupil from proceeding with any petition for admission until after a date to be specified in the order. H

(6) For the purpose of this section, 'pupil' includes a person who has completed the prescribed period of pupillage and has yet to be admitted as an advocate and solicitor. I

[11] In *In Re GH Conaghan* [1961] MLJ 81 it was stated that the legal profession occupies by law a privileged position. The continued existence of

that position can only be justified if every individual member of the profession conforms to certain standards.

[12] What is or is not professionally ethical at times is controversial and there are no clear guidelines on the subject. However, one may be able to appreciate the scope of ethical standards required of an advocate from various statutes, rules, guidelines from the Bar Council, cases not only in Malaysia but also other jurisdiction of the Commonwealth. It must be emphasised that what is ethical in one country may not be so in another. For example, advertisement of an advocate or taking a brief on contingency fees in America may not be unethical but an accepted practice. However, in Malaysia, the Bar Council and other statutes or rules may consider such practice as abhorrent to notions of justice and fair play or grave professional misconduct. The courts in almost all cases will confirm with the rulings of the Bar Council or DC as courts take the view that what amounts to conduct unbecoming of an advocate and solicitor is one according to the standards established by members of that honourable profession. That will not be the case if it relates to sentencing. This distinction must be kept in mind to appreciate our judgment in the proper perspective.

[13] A survey of some of the cases before and after the coming into effect of the LPA 1976 will demonstrate that courts have often allowed an advocate and solicitor to be struck out from the Roll only when there was criminal element personally attributed to the advocate and solicitor. Support for the proposition is found in a number of cases. To name a few are as follows:

(a) in *Re A Solicitor* [1936] MLJ 192 it was held that where a solicitor has been convicted of actual dishonesty such as misappropriation of money to his own use he ought to be struck off the roll and not merely suspended. Holdings Whitley AG CJ observed at p 193:

> It was thus clear that the solicitor had used for his own purposes money of his client which had come into his hands in his capacity as that client's solicitor and that he had been unable to pay over that money when requested so to do.
>
> We were of opinion that conduct such as this constituted the most serious type of offence which a solicitor can commit in pursuance of his profession. The application of the Bar Committee was based upon section 25(1), (2)(a) and (2)(b) of the Advocates and Solicitors Ordinance. We were satisfied that due cause was shown why the solicitor should be struck off the roll under both of those sub-sections in that he had: (a) been convicted of a criminal offence implying a defect of character which unfitted him for his profession; and (b) had been guilty of grossly improper conduct in the discharge of his professional duty.
>
> We were referred to a number of English decisions. From the judgment of Wills J in *Re a Solicitor* [1894] 1 QB at p 259 it would appear that where a solicitor has been convicted of actual dishonesty in the shape of anything like misappropriation of money to his own use he ought to be struck off the rolls

but that where his professional misconduct does not amount to such dishonesty it may be sufficient punishment merely to order him to undergo suspension. The principle upon which punishment in such cases should proceed was also discussed in the judgments of the Court of Appeal in *Re a Solicitor* 5 TLR 486. Lord Coleridge LCJ observed that 'it could not be laid down [242] as an absolute rule that a conviction for felony must always cause a solicitor to be struck off the rolls. The circumstances of each conviction must be considered by the Court. There were some felonies, no doubt, which were infinitely disgraceful; there others which an honourable man might commit without suffering any stain to his honour. No doubt punishment must follow on every conviction, because the law must be vindicated; but it might well happen that a man who had been convicted of such a felony would not be unfit to associate with his fellowmen or to be trusted with their money or their confidence'. Lord Justice Lindley also protested against the proposition that whenever a solicitor was convicted for felony, he must, as a matter of course, be struck off the rolls. He went on to say: 'Instances might easily be given of felonies which would not justify such a course. Here, however, the felony was one affecting the trustworthiness of the solicitor, and if, when the matter first came before the Chief Justice and Mr Manisty, he had been a member of the Court, he would have thought, on the facts, that the solicitor ought not to have remained on the rolls'. That was a case in which it appeared that the solicitor had applied various sums of money to his own use but when the first application to strike him off was made to the Divisional Court he had not been prosecuted and on his undertaking to make restitution he was merely suspended.

Whilst, however, being satisfied that this was a case in which we ought to order the solicitor to be struck off the roll we felt it proper to intimate that in our opinion this order should not preclude him under suitable circumstances and after the lapse of a suitable period from applying to the Court under section 26G of the Ordinance to have his name replaced on the roll. We made this intimation in view of: (a) the youth and inexperience of the solicitor; (b) the fact that it was an isolated offence; and (c) the fact that, before conviction, restitution had been made in full.

The solicitor had been called to the Bar in England but had never practised there nor read in the Chambers of any member of the Bar. On arriving in this Colony he had immediately set up in practice by himself as an advocate and solicitor of this Court without any previous experience in the office of any local firm of solicitors and without any knowledge of book-keeping or experience in the keeping of clients' account. In the judgment of the learned District Judge who tried the solicitor the following passage occurs: 'I suspect that both Ng Poh Hok (the client) and accused were to some extent the catspaws of Lee Song Chua. I do not think accused planned deliberately to deprive Ng Poh Hok of his money and I have dealt leniently with him'. It is unfortunately the fact that the solicitors of this Colony, owing to difficulties of language and especially if they themselves are inexperienced, are in many cases to an undesirably large extent at the mercy of and in the hands of their clerks. Lee Song Chua, the clerk of this solicitor, we were informed, has recently also been convicted of criminal misappropriation.

> While we did not think that these considerations warranted us in making any order save an order that this solicitor be struck off the roll and while we in no way wished to prejudge any application for reinstatement that might eventually be made we felt this was a cause in which, if he is allowed to retain his qualification as a member of the Bar in England, it was not impossible that this solicitor might one day be readmitted to practise in this Colony.
>
> In addition to the order striking him off the roll of this Court we made an order that the costs of the Bar Committee should be paid by the respondent.

(b) *In Re GH Conaghan* [1961] MLJ 81 the respondent, in his capacity as a solicitor, received $14,000 from a third party for payment to a client. The sum received was not paid to the client but was knowingly applied by the respondent for other purposes. The court held that what the respondent had done amounted to professional misconduct of the most serious character. Thomson CJ observed at p 81:

> We are in no way concerned with the domestic arrangements of the firm of Conaghan, Wreford & Thornton for it is abundantly clear that the conduct of the business of that firm in Penang was under the sole control of the present respondent.
>
> He, in his capacity as a solicitor and having control of the firm, received $14,000 from a third party for payment to a client for whom the firm was acting. It is equally clear that that money was not, and to this day has not been, paid to the client for whom it was received but has been knowingly applied to other purposes.
>
> That may or may not amount to fraud. It may or may not amount to dishonesty. It may or may not be capable of being described by the euphemism of 'miscalculation' which has been used, but it certainly does amount to professional misconduct of the most serious character.
>
> We have listened to a plea for leniency. I need hardly say we have given such weight as we possibly can to that plea. Nevertheless, the fact remains that in all these cases there are three interests to be concerned. There is the interest of the solicitor; there is the interest of the legal profession as a whole; and there is the interest of the public. The legal profession occupies by law a privileged position. The continued existence of that position can only be justified if every individual member of the profession conforms to certain standards.
>
> The present respondent has fallen far short of these standards. In consequence he has done harm not only to himself but also to his client and to his profession as a whole and to the public for in the modern world it is in the public interest that there should be a legal profession observing the highest possible standards of conduct.

[14] There are a number of cases to support the proposition that even if there were criminal elements or breach of undertaking the courts ordinarily will not sustain an order to be struck out from the roll. For example:

(a) in the Singapore case of *JB Jeyaratnam v Law Society of Singapore* [1988] 3 MLJ 425 the appellant was struck off the roll of advocate and solicitors on the ground that the appellant had been convicted of criminal offences implying a defect of character making him unfit for his profession. The Privy Council held that:

> The Chief Justice should not have sat as a member of the full bench of the High Court which heard the show cause proceedings, since one of the primary submissions of the appellant was that the Chief Justice's own decision on the appeal from Judge Khoo and his refusal to reserve questions of law for the Court of Criminal Appeal were erroneous. Section 95(6) of the Legal Profession Act (Cap 161, 1985 Ed) is not mandatory but directory only.
>
> (2) Although it is usually not open to the court hearing a show cause action against an advocate and solicitor to go behind a conviction in order to determine whether or not the conviction was proper, the circumstances in this case were exceptional enough to warrant examination of the grounds on which the convictions were attacked as being bad in law.
>
> (3) As the High Court had declined to reserve questions of law for decision by the Court of Criminal Appeal, the appellant had no opportunity to test any of the questions of law involved by appeal to the Court of Criminal Appeal. Their Lordships found it difficult to understand how any serious question of law arising in a criminal case on which a person's conviction might depend could be said not to be of public interest within the meaning of s 60(1) of the Supreme Court of Judicature Act (Cap 15, 1970 Ed). If it could be shown that there were questions of law of public interest which should have been reserved for decision by the Court of Criminal Appeal and that this would have led to the quashing of the convictions, the convictions should not be conclusive against the accused in the course of disciplinary proceedings. The instant appeal therefore turned on the question whether the convictions were vitiated by errors of law.
>
> (4) The declaration sworn by the appellant and Wong was not per se admissible as evidence of any fact so as to bring it within the scope of s 199 of the Penal Code (Cap 103, 1970 Ed). The s 199 charge was misconceived in law as held by Judge Khoo.
>
> (5) To prove the s 421 charges, it was necessary to show that the money became the property of the Workers' Party. It was found by Judge Khoo that the $2,000 cheque and the $200 cheque had been transferred with the concurrence of the donors. Similarly, the $400 cheque had been disposed of with the consent of the donor before it was presented for payment by the Workers' Party. The Workers' Party never had more than a defeasible title to the proceeds of the cheques. Before the title was perfected, the cheque was in each case lawfully disposed of in accordance with the donor's instructions. Accordingly, the proceeds of the cheques never became the property of the Party and the appellant and Wong could not have been guilty of an offence under s 421 of the Penal Code (Cap 103, 1970 Ed).

(6) The Chief Justice, as an appellate judge, was not entitled to substitute his own findings of fact for those of Judge Khoo on the question of the donors' consent to the disposal of the $2,000 cheque and the $200 cheque. The judgment of the Chief Justice had started from a false premise with respect to the trial judge's assessment of the evidence and had proceeded upon a clear misdirection with respect to the onus of proof. For these reasons, it could not be supported.

(7) The convictions of the appellant were vitiated by errors of law. His appeal against being struck off the roll was accordingly allowed.

(b) in the Singapore case of *In the matter of an Advocate and Solicitor* [1984] 1 MLJ 331, the complaint was that the respondent had been convicted of criminal offences (see *In the matter of an Advocate & Solicitor* [1981] 2 MLJ 215b and *HL Wee v The Law Society of Singapore* [1982] 2 MLJ 293) implying a defect of character which made him unfit for his profession. The respondent submitted that he was entitled to have the show cause order discharged on the grounds of *autrefois convict*; or of a doctrine of estoppel, namely issue estoppel, or res judicata in its wider sense and of the court's inherent jurisdiction to stay proceedings on the ground that they were oppressive and an abuse of its process.

The court held that 'in the present case, on the assumption that the doctrine of autrefois is available in disciplinary proceedings against an advocate and solicitor, the respondent's plea of *autrefois convict* must fail. One essential ingredient which is necessary to prove in the present proceedings is the respondent's conviction of one or more criminal offences. This ingredient is unnecessary to support a complaint in the first disciplinary proceedings and it follows that the respondent has not been put to peril of disciplinary punishment for the same complaint or 'offence' as that which he is charged; on the facts before the court, the plea of issue estoppel, even if the plea is available in the present disciplinary proceedings, has not been successfully made out by the respondent. It was plain on the facts, which show that the respondent was determined to exhaust all possible avenues in relation to these criminal convictions, that it would be against the interest of the public for the Law Society to withhold applying to the High Court for a show cause order on the delay charge until the disciplinary committee which had only recently been appointed had heard the convictions charge and had reported its findings; the delay charge and the convictions charge although both arise from substantially the same facts have different legal characteristics and the failure to hear together the two show cause orders, one made on 13 January 1981 and the other on 17 September 1982, did not amount to oppression and injustice to the respondent; on the facts and having regard to all the circumstances and the nature of the offence, the respondent's conviction clearly implies a defect of character which makes him unfit

for the profession; it would not be in the public interest or in the interest of the profession, on all the facts and the circumstances of the present case that no penalty is imposed. The court held that the respondent should therefore be suspended from practice for a period of two years and that he be ordered to pay the costs of the proceedings;

(c) in *WE Balasingam v The Bar Council* [1986] 1 MLJ 334 the appellant, a practising advocate and solicitor, was convicted in the sessions court under ss 109 and 409 of the Penal Code with abetting the commission of criminal breach of trust in respect of a sum of $29,500. He was sentenced to six months' imprisonment and a fine of $20,000. His appeal to the High Court was dismissed. Subsequently a disciplinary committee appointed by the Chief Justice to hold a formal inquiry under s 100 of the Legal Profession Act made an order that the appellant be struck off the roll of advocates and solicitors. He appealed against that order on six grounds, among them that the disciplinary committee failed to fully appreciate the facts that the conviction of the appellant did not touch upon the conduct of the appellant as an advocate and solicitor and that the committee was not in possession of the appeal record of the sessions court.

The court held that 'it was not open to the disciplinary committee to go behind the conviction to ascertain whether the conviction was justified. The conviction was final in that the appeal against the conviction was dismissed, and therefore it was a conviction within the contemplation of s 93(2); it is not every kind of misconduct of the advocate and solicitor which the disciplinary committee should be concerned with but only misconduct committed in his professional capacity. The provisions of s 100(1), added by Act A567, came into force since December 16, 1983 and are inconsistent with the provisions of s 93(2)(a), which should be read subject to s 100(1), so that the words 'a criminal offence as makes him unfit to be a member of his profession' appearing in s 93(2)(a) should be read and understood to mean a criminal offence committed in his professional capacity; for the reason that the disciplinary committee made the enquiry without the appeal record before it, its decision and order should be set aside and this case should be sent back to the committee to hold a fresh inquiry. The sessions court appeal record and the High Court judgment should be made available to the committee for the purpose of the fresh inquiry; it was not proper and correct for the committee to arrive at a finding of instigation, conspiracy and aiding without the proper record of evidence before it';

(d) in the Singapore case of *Re Ram Goswami* [1988] 3 MLJ 376 the respondent, an advocate and solicitor, appeared before a disciplinary committee appointed to hear and investigate a complaint against him. The substance of the complaint was that the respondent, while acting for

A one Abdul Hamid who was ordered in two criminal cases in the district court to show cause why his bail money of $50,000 should not be forfeited, did mitigate to the court in terms which he knew were untrue as the bail money, contrary to the mitigation made, was not the 15 years' savings of the bailor nor did it belong to or was provided by the bailor. The respondent said that, at the time of making the mitigation, he did not know that the bail money was Hamid's.

The committee found that the respondent knew all along that the money never belonged to Hamid and was satisfied beyond reasonable doubt that the respondent had mitigated to the court in terms which he knew or ought to have known were untrue, and had thereby wilfully and falsely misrepresented to the court the true state of affairs. Accordingly, the committee determined that the respondent was guilty of grossly improper conduct in the discharge of his professional duty within the meaning of s 80(2)(b) of the Legal Profession Act (Cap 161) ('the Act'). The respondent was also found guilty of such conduct as would render him liable to be disbarred or struck off the roll of the court or suspended from practice or censured if a barrister or solicitor in England, due regard being had to the fact that the two professions were fused in Singapore, within the meaning of s 80(2)(h) of the Act;

(e) in *Re TT Rajah; The Law Society of Singapore v Thampoe T Rajah* [1973] 1 MLJ 79, the statement of the case against the respondent before the disciplinary committee was: (i) using grossly offensive and improper expressions and threatening gestures to defence counsel in the course of the proceedings and adjournments; (ii) making improper statements in the course of the proceedings; (iii) improperly conducting himself in a manner to encourage the gallery of the court to bring the court into contempt and disrepute; and (iv) improperly seeking to convert the court into a forum for expressing political views unconnected with the issue before the court. The court held that 'the conduct and words spoken by the respondent were both disgraceful and dishonourable and in the interests of the profession, the proper administration of justice and of the public a serious view should be taken of this matter and the respondent should be suspended from practice for two years';

(f) in *Au Kong Weng v Bar Committee, Pahang* [1980] 2 MLJ 89 the disciplinary committee of the Pahang Bar Committee found that the appellant had been guilty of conduct unbefitting an advocate and solicitor in that he had broken an undertaking given by him to another advocate and solicitor. The bar committee ordered the suspension of the appellant for a period of three months. The appellant appealed to the Federal Court.

The court held that 'on the facts as disclosed and found by the committee, the finding that the appellant was guilty of professional misconduct unbefitting an advocate and solicitor could not be

successfully challenged before the courts; a relationship of trust and confidence between the courts and the members of the bar is essential for the due administration of justice in this country, and that relationship would be impaired, if on any but the most compelling grounds, the courts were to interfere with the finding of the committee in a matter so peculiarly its concern';

(g) in the Singapore case of *Re Francis T Seow The Law Society of Singapore v Francis T Seow* [1973] 1 MLJ 199 the respondent was an advocate and solicitor. Ratnam joined his firm as a profit-sharing partner. The firm was instructed by Gemini Chit Fund Corp Ltd, now in liquidation, in connection with chit fund matters. Ratnam was the solicitor in charge of all Gemini matters. Later, the Minister for Finance, acting under the Chit Fund Act presented a petition for winding up Gemini. During this time, the respondent discovered a questionable letter sent by Ratnam. He merely questioned Ratnam about it, on the disposal of Gemini's movable property in Malaysia. The respondent's firm also acted as solicitors for Gemini in the winding up proceedings. Sometime later, a police party arrived at the respondent's office with a warrant for the arrest of Ratnam and a search warrant to search to the respondent's office. The respondent refused to allow the police to search his office. He called the attorney general on the telephone and gave his personal undertaking to hand over to the police all books, files and documents relating to Gemini. The attorney general relying on the respondent's undertaking instructed the police to discontinue the search. The respondent subsequently relying on his partner, Ratnam, confirmed to the attorney general that all files relating to Gemini had been handed over to the police. It was later found that two files relating to Gemini's affairs and two deposit receipts and the seal of Gemini were in the respondent's office.

A disciplinary committee appointed by the Chief Justice found the respondent guilty of grossly improper conduct in the discharge of his professional duty under s 84(2)(b) of the Legal Profession Act (Cap 217, 1970 Ed) in failing in his duty to ensure that the letter to Gemini in Malaysia (having regard to its criminal nature, the full import of which was apparent to the respondent), was not countermanded, withdrawn, repudiated or otherwise negatived. The disciplinary committee also found the respondent guilty of grossly improper conduct in the discharge of his professional duty under see s 84(2)(b) in giving his undertaking to the attorney general so recklessly and irresponsibly. The court suspending the respondent from practice for one year held that the respondent was not only of in error of judgment in relying on and placing his trust in a partner but also was guilty of improper conduct in the discharge of his professional duty. The court held that 'it was wholly deplorable conduct of him as a man and dishonourable of his profession; it was not only gross misjudgment of

Ratnam's character but also the gross failure on his part to honour his undertaking to the Attorney General'. The court said a simple and normal step to take was for the respondent to give express orders and directions to every member of his staff to search every room of his office for any relevant files or documents relating to Gemini, but this was not done. The court held that it was culpable negligence on the part of the respondent amounting to grossly improper conduct in the discharge of his profession; and

(h) in the Singapore case of *Re David Marshall; Law Society of Singapore v David Saul Marshall* [1972] 2 MLJ 221 the respondent, a senior advocate and solicitor of the Supreme Court, acted for the managing editor and three other employees of the *Nanyang Siang Pau*, a Chinese language daily newspaper, in their applications for habeas corpus to the High Court.

The affidavits in support of the habeas corpus applications were affirmed by the four applicants and these were filed in the registry of the Supreme Court. The habeas corpus applications were fixed for hearing on 26 May 1971. At the hearing, these applications were adjourned to 7 June 1971. Both the attorney general who appeared for the government and the respondent were requested to see the Chief Justice in his chambers. Whilst in the Chief Justice's chambers, the attorney general intending to prevent publication of the affidavits before the hearing fixed on 7 June 1971, drew the attention of the Chief Justice to the fact that affidavits and their contents had a habit of being leaked out to the press and the public at large before the hearing. The respondent thereupon volunteered an oral undertaking in the following terms:

> The Attorney General need have no anxiety about our office because we never give any pleadings to the press before trial and I can assure you that neither I nor my office have given these affidavits to them for publication.

The respondent, however, before 7 June 1971 sent: (a) five sets of the affidavits together with explanatory documents by registered post to the Secretary General of Amnesty International; (b) two sets of the affidavits to Sir Elwyn Jones QC; and (c) one set of the affidavits to Mr Harold Ebens, the editor of the London Sunday Times. All the affidavits sent to the persons above (except one) had the headings deleted and the words 'Instructions to Counsel' substituted. The jurats of these affidavits were also deleted. On 4 June 1971, the Chief Justice ordered certain portions of these affidavits to be struck out.

The disciplinary committee on the above facts held that the respondent's undertaking given to the attorney general in the presence of the Chief Justice was a general undertaking not to release the affidavits to the press. This undertaking was given by the respondent

in his professional capacity, and the respondent had, therefore, committed a breach of the undertaking in sending the contents of the affidavits to the persons mentioned above. The respondent was asked to show cause in the High Court why he should not be dealt with under s 84 of the Legal Profession Act (Cap 217, 1970 Ed).

The court suspending the respondent for six months held that 'the respondent meant the undertaking to be understood by the Attorney General that neither the respondent nor his office would be a party to the contents of the affidavits being made available to the 'press' using the expression 'press' in its generally accepted connotation without any qualification whatsoever; the respondent acted with premeditation and deliberation and he had to have foreseen that one of the consequences of his making available to the press the contents of the affidavits was the likelihood of the contents being published in the news media; the test of what constitutes 'grossly improper conduct in the discharge of his professional duties' has been laid down in many cases to mean conduct which is dishonourable to him as a man and dishonourable in his profession. Applying that test and taking into consideration the fact that the respondent was a leading member of the legal profession in Singapore, that the undertaking was given to the Attorney General in the presence of the Chief Justice, that the matter had aroused considerable public interest and the interest of journalists and pressmen all over the world, and the fact that the legal profession here had to be zealous and constantly endeavoured to uphold its standing in the community by strict adherence to the ethics and etiquette accepted as binding by the profession on its members; the respondent was suspended from practice for a period of six months'. The period of suspension was ordered to commence from the date of the order.

[15] We have taken the trouble to set out the above cases and facts to demonstrate the courts do not easily tolerate the order for an advocate and solicitor to be struck off from the Roll. The DB under the LPA 1976 must take cognisance of established principles relating to public decision maker and alike which are well established. One important consideration will be to take cognisance of the *Wednesbury* principle in the widest sense to incorporate the principles relating to proportionality and reasonableness in the light of the Federal Constitution. The other consideration as per the cases cited above relates to actual misappropriation of clients' money as opposed to other criminal conduct which may not be applicable to the advocate and solicitor relationship. There are also other consideration which need to be taken into account which we think need not be set out here.

A PRELIMINARIES AND SUBMISSIONS

[16] Learned counsel for the appellant says the reason for DB decision was based on the act of the appellant leaving the 'running of the firm', conveyancing matters to his clerk, Encik Shakri, and also in relation to complaints against the appellant which are pending.

[17] The appellant's main grounds of appeal was that: (i) he honestly believed that when he released the monies to Shakri, he was entitled in law to do so; (ii) this belief is premised on the basis the money released belong to Rashidee, a director of his client, Prestij Bestari Sdn Bhd; (iii) the order or sentence was disproportionate; (iv) the DB erred in considering the other pending complaints against the appellant; and (v) the DB was wrong in deciding that the appellant was a danger to the public as an advocate and solicitor.

[18] Based on the above grounds, as well as the facts, it is patently clear that this is not a case of personal dishonesty as well as the DB has taken into consideration materials which it ought not have considered in coming to the conclusion based on *Wednesbury* principle. In addition, the proportionality principle also appears to have escaped the mind of DB.

[19] On the issue of proportionality principle, learned counsel for the appellant says:

(a) In *R v Secretary of State for the Home Department Ex p Daly* [2001] UKHL 26, the House of Lords stated as follows:

> 27. The contours of the principle of proportionality are familiar. In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 the Privy Council adopted a three-stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:
>
> > whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

(b) In *Ngiam Geok Mooi v Pacific World Destination East Sdn Bhd* [2016] 6 CLJ 395 adopted the principle adumbrated above, and held:

> [24] ... In essence, the *proportionality principle requires the court to strike an effective balance between the severity of an employee's conduct and the sanction imposed*. As Professor Endicott has eloquently remarked, it is 'unreasonable to use a sledgehammer to crack a nut, or to make a

mountain out of a mole hill. (See Endicott, *Administrative Law*, p 273). This applies to awards of punishment also. *Punishment should be commensurate with the gravity of the offence*.

[26] The House of Lords in *R (Daly) v Secretary Of State For The Home Department* [2001] AC 532 demonstrated how the traditional test of *Wednesbury* unreasonableness has moved towards the doctrine of necessity and proportionality. Lord Steyn noted that the criteria for proportionality are more precise and more sophisticated than traditional grounds of review and went on the outline three concrete differences between the two:

(a) Proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions.

(b) Proportionality test may go further than the traditional grounds of review in as much as it *may require attention to be directed to the relative weight accorded to interests and considerations.*

(c) Even the heightened scrutiny test is *not necessarily appropriate to the protection of human rights.*

(c) Further, the principle of proportionality requires an 'administrative authority, when exercising a discretionary power to 'maintain a proper balance between any adverse effects which its decision may have on the rights, liberties, or interests of persons and the purpose which it pursues'.

(See *De Smith's Judicial Review* (6th Ed) at p 555).

It is submitted that in applying the doctrine of proportionality, a decision-maker ought to have regard to the balance of the limitation it sought to impose on an individual (ie a decision) and whether the limitation may impact an individual rights.

[20] On the issue of 'right to livelihood' as encapsulated in art 5(1) of the Federal Constitution, the learned counsel for the appellant says:

(a) In *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261, the Court of Appeal held:

> Adopting the approach that commends itself to me, I have reached the conclusion that the expression 'life' appearing in art 5(1) does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are the right to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer to its members. It includes the right to live in a reasonably healthy and pollution free environment.

[21] The learned counsel for the appellant says that the issue relating to running of the firm by Shakri and other complaints not related to investigation

of the DC tantamount to the DB having given consideration to the irrelevant matters thereby compromising the decision making process. In support of the proposition, learned counsel relies on the following cases namely:

(a) in *Re A Solicitor* [1936] 1 MLJ 192; and

(b) in *Dharshan Singh Atma Singh v Majlis Peguam Malaysia* [2015] MLJU 2350; [2015] 4 CLJ 1083.

[22] The learned counsel for the appellant also says, taking into consideration irrelevant matters at the DB stage tantamount to breach of natural justice. In support of the proposition relies on the following cases:

(a) in *Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor* [1990] 3 MLJ 364; and

(b) in *Regina v Secretary of State for the Home Department, ex parte Benwell* [1985] QB 554.

[23] On the issue of proportionality, learned counsel for the respondent also relies on the latest decision of the Court of Appeal in the case of *Majlis Peguam Malaysia v Hari Krishnan a/l Jeyapalan* [2017] 1 MLJ 770; [2017] 4 CLJ 225 where the coram consisted of Justices Hamid Sultan Abu Backer JCA, Prasad Sandosham Abraham JCA and Asmabi Mohamad JCA.

[24] Learned counsel for the intervener ie Bar Council Malaysia was not able to convince us by case laws and authority on the issue of proportionality and breach of natural justice related to the sentence. The submission was related to general principles of law which, inter alia, reads as follows:

> 5.1 The law reports are replete with cases which repeat the stand that the supervision and disciplining of advocates and solicitors ought properly to be left to the profession itself and the body statutorily established for this purpose; for example:
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> (a) *Au Kong Weng v Bar Committee, Pahang* [1980] 2 MLJ 89, FC
>
> (b) *Gana Muthusamy v LM Ong & Co* [1998] 3 MLJ 341, CA; and
>
> (c) *Trikkon Sdn Bhd v Mahinder Singh Dulku* [2010] 8 MLJ 239
>
> 5.2 In the Federal Court case of *Au Kong Weng v Bar Committee, Pahang* in particular, His Lordship Raja Azlan Shah, as he then was, said this in his judgment:
>
> > Statutes relating to the legal profession now entrust the supervision of advocates and solicitors' conduct to a committee of the profession, for it knows and appreciates better than anyone else the standards which responsible legal opinion demands of its own profession.

[25] We have read the appeal records and the able submissions of the learned counsel. After giving much consideration to the submissions of the learned

counsel for the intervener, we take the view that the DC decision ought to be affirmed and the DB decision as well as the decision of the High Court ought to be set aside. Our reasons, inter alia, are as follows:

(a) in the instant case, the DC had found the appellant guilty of s 94(3)(c), (n) and (o) of the LPA 1976. The most damaging to attract suspension for a maximum period on the facts of the instant case in our view will be related to s 94(3)(c) which says dishonest or fraudulent conduct in the discharge of his duties. The other two sections namely s 94(3)(n) and (o) relates to gross disregard of his client's interest; and being guilty of any conduct which is unbefitting of an advocate and solicitor or which brings or is calculated to bring the legal profession into disrespect on the facts of the case can only lead to suspension up to five years and/or fine;

(b) taking into consideration the proportionality principle, case laws and the various provisions of the Federal Constitution, any reasonable tribunal appraised of the facts will not disturb the findings and recommendations of the DC; and

(c) the gross disregard of the DB on issues related to proportionality principle and case laws inclusive of constitutional safeguards as well as taking into consideration irrelevant matters compromised the decision making process. This warrants the decision of the DB to be set aside in limine.

[26] For reasons stated above, the appeal is allowed. The decision of the DC is affirmed. The decision of the DB is substituted to give effect to the DC recommendation. The High Court order is set aside. Deposit is to be refunded.

We hereby order so.

Appeal allowed.

Reported by Kohila Nesan